

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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B & R SUPERMARKET, INC., d/b/a	:	Case No. 1:17-cv-02738-MKB-JO
MILAM'S MARKET, a Florida	:	
corporation, et al., Individually and on	:	<u>CLASS ACTION</u>
Behalf of All Others Similarly Situated,	:	
	:	
Plaintiff,	:	JOINT STATUS REPORT
	:	
v.	:	Conference Date: February 6, 2019
	:	
VISA, INC., a Delaware corporation, et al.,	:	
	:	
Defendants.	X	

Plaintiffs B & R Supermarket, Inc. (d/b/a Milam's Market), Grove Liquors LLC, Strouk Group LLC (d/b/a Monsieur Marcel), and Palero Food Corp. and Cagueyes Food Corp. (d/b/a Fine Fare Supermarket) (collectively, "Plaintiffs") and defendants Mastercard International Inc. ("Mastercard"), Discover Financial Services ("Discover"), Visa Inc. and Visa U.S.A. Inc. (together, "Visa"), and American Express Company ("AmEx") (collectively, "Defendants") respectfully submit this joint report in advance of the status conference scheduled for February 6, 2019. The parties agree that there are no issues ripe for discussion with the Court and respectfully request to cancel the February 6 status conference.

I. PENDING MOTIONS

Plaintiffs' Renewed Motion for Class Certification. Judge Brodie entered an order denying Plaintiffs' motion for class certification without prejudice. (Dkt. No. 644.) Plaintiffs served their renewed motion for class certification ("renewed motion") on July 16, 2018. Pursuant to the Court's August 21, 2018 amended scheduling order, Defendants' response was due October 19, 2018, and Plaintiffs' reply was due November 19, 2018. (*See* Dkt. No. 660.) After the service of Plaintiffs' renewed motion, AmEx informed Plaintiffs of an inadvertent error

that resulted in documents being omitted from AmEx's document review pool as explained in AmEx's October 16, 2018 letter to the Court (Dkt. No. 671). On October 17, 2018, the Court entered an order terminating the renewed motion without prejudice to reinstatement and directing the parties to submit a proposed schedule when the parties agree that they are prepared to resume briefing. (*See* Dkt. No. 672.)

AmEx has now reviewed those additional documents for responsiveness and produced all responsive, non-privileged documents on a rolling basis between October 26, 2018 and November 10, 2018. On November 15, 2018, AmEx produced its privilege logs and confirmed that production was complete. On December 20, 2018, Plaintiffs advised Defendants that the review of AmEx's supplemental production was substantially complete and that Plaintiffs did not anticipate supplementing Plaintiffs' renewed motion or expert reports. By letter dated December 21, 2018, Plaintiffs identified concerns and questions regarding AmEx's second privilege log for withheld documents and supplemental production of documents. Following a meet and confer, AmEx responded to Plaintiffs' concerns by letter dated January 18, 2019 and produced additional documents on January 25, 2019.

On January 25, 2019, the parties met and conferred regarding a schedule for Plaintiffs' renewed motion. Plaintiffs confirmed that they do not intend to amend or supplement their renewed motion for class certification, class certification expert report, or merits expert reports. Through subsequent discussions, the parties have agreed that, as set forth in the proposed amended case schedule filed herewith and if approved by the Court, Plaintiffs' renewed motion should be reinstated effective with the entry of that order, Defendants will serve their opposition to the renewed motion on March 15, 2019 and Plaintiffs will serve their reply on May 24, 2019.

Discover's Motion to Compel Arbitration. In light of the Court's denial of Plaintiffs' motion for class certification on March 11, 2018 (Dkt. No. 644), and consistent with Discover's position as set forth in previous Joint Status Reports, it is Discover's position that it is proper to wait until the Court has decided Plaintiffs' renewed motion for class certification before moving to compel arbitration against the approximately 1,200 putative class members with which Discover has valid, enforceable arbitration agreements.

II. CASE SCHEDULE

Amended Case Schedule. On August 20, 2018, the parties jointly requested that the current case schedule be amended to extend the briefing on Plaintiffs' renewed motion for class certification and the deadline for Plaintiffs' merits expert reports. (Dkt. No. 659.) The Court granted the parties' request on August 21, 2018. (Dkt. No. 660.) As described above, Plaintiffs' renewed motion for class certification was terminated without prejudice to reinstatement. (Dkt. No. 672.) The parties request that the Court enter the proposed amended case schedule filed herewith.

Daubert Motions concerning Plaintiffs' Renewed Class Certification. Defendants intend to file a *Daubert* motion relating to Plaintiffs' certification expert and Plaintiffs may do the same with respect to any certification expert(s) proffered by Defendants. Accordingly, the parties have met and conferred and propose a briefing schedule for such motions in the proposed amended case schedule filed herewith. If that proposed schedule is approved by the Court, Defendants will serve their motion on March 15, 2019; Plaintiffs will serve any brief in opposition on May 24, 2019; and the reply will be served on June 24, 2019. Plaintiffs will serve their motion on May 24, 2019; Defendants will serve any brief in opposition on June 24, 2019;

and the reply will be served on July 26, 2019. The parties respectfully request that the *Daubert* briefs be taken up and considered at the same time as the briefing on class certification.

III. STATUS OF DISCOVERY

Defendants' Production of Transaction Data. In early 2018, Plaintiffs requested that Defendants provide transaction data for the time period through and including September 30, 2017. After a lengthy meet and confer process, Visa, Mastercard, and Discover largely agreed to produce specific data as requested and AmEx agreed to supplement its prior production of the transaction data for a sample of merchants and produce a series of monthly reports that reflect FLS chargebacks in an aggregate form. Mastercard and Discover completed their productions prior to the filing of the renewed motion for class certification. Visa and AmEx completed their productions later that month. Plaintiffs intend to meet and confer further with AmEx regarding the production of further transaction data.

Additional Fact Discovery. Plaintiffs identified concerns and questions regarding AmEx's second privilege log for withheld documents and supplemental production of documents and have met and conferred with AmEx regarding these issues. AmEx produced additional documents on January 25, 2019. Other than the meet and confer regarding documents withheld as privileged, Plaintiffs have determined that no additional fact discovery will be necessary.

Third-Party Discovery. During the fact discovery period, Plaintiffs issued subpoenas to numerous third parties, including those that Plaintiffs believe have served as acquirers and/or processors with respect to merchant transactions identified in Defendants' production of transaction data. To date, Plaintiffs have received all anticipated third party data productions.

Respectfully submitted this 30th day of January, 2019, by:

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered parties and attorneys of record.

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